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IN THE

Supreme Court of British Columbia.

RE ELLARD TRUSTS.

CASE ON APPEAL.

THEODORE DAVIE, Q.C.,

SOLICITOR FOR APPLICANTS.

152,238

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Appeal to the Divisional Court.

In the Supreme Court of British Columbia.

On Appeal to the Divisional Court.

In the matter of the trusts of the Will of James Ellard, late of the city of New Westminster, deceased, and in the matter of the Trustee Act. 1850. and

BETWEEN

ROBERT DICKINSON AND GEORGE TURNER,
Plaintiffs,

AND

MARY ELLARD, JAMES ELLARD, ANNIE ELLARD, SIDNEY ELLARD, ADA ELLARD, REUBEN ELLARD, (apellants) JAMES WILTON, HARVEY AND ESTHER HARVEY, his wife, (respondents)
Defendants.

STATEMENT.

James Ellard late of the City of New Westminster, deseased, departed this life on or about the 10th day of January, A. D. 1878, having first duly made and executed his last Will and Testament, dated the 26th day of June, A. D. 1873, and with two Codicils thereto dated the 28th day of May, A. D. 1877 and the 10th day of January, A. D. 1878, respectively, whereby he appointen Robert Dickinson and George Turner Trustees and executors thereof.

Previously to his death the said testator had carried on business at a dry goods merchant at the city of New Westminster under the name of James Ellard & Co.

n the codicil to his will be directed the said executors to carry on said business for the benefit of his wife and children and to receive the profits thereof and in the first place to pay to James Wilton Harvey in consideration of his managing said business and in further consideration of his wife minding his children and acting as housekeeper to them as hithe to a sum equal to one fourth of the profits of said business yearly.

On the 20th November, 1885, the Honorable Mr. Justice Crease made a Decree discharging the said Robert Dickinson and George Turner as such Executors and Trustees upon passing and taking certain accounts and making certain enquiries as will more fully appear by the Decree itself which is printed on page herein.

In and by said Decree of the Respondent James Wilton Harvey was appointed Receiver and Manager of the business of the Testator which he in his life time carried on under the name, style and firm of Ellard & Co.

On the 14th day of July, A. D. 1887, the Full Court granted special leave to the Appellants to appeal from the said Decree.

On the 25th day of July, A. D. 1887, the said Appeal was heard and the Full Court amended and varied the said Decree in certain particulars and *inter alia* ordered that new Trustees may be appointed of the Testator's Will and thereupon the appointment of the Respondent, James Wilton Harvey as Receiver should cease.

On the 4th day of August 1889 an order was made by the Honorable Mr. Justice Crease declaring that said James Wilton Harvey is entitled to draw for his services as manager of the Estate of said deceased a sum equal to one fourth of the gross profits of said business and that said James Wilton Harvey shall be entitled to pay himself out of the said business a sum equal to one fourth of the gross returns or profits of said business from the death of said James Ellard.

On the 8th of February 1888 an order was made by the Honorable Mr Justice Crease appointing Thomas Cunningham and William Archibald Duncan trustees of the will of James Ellard deceased in in place of George Turner and Robert Dickson who were discharged by order of 20th November 1885 and directing a referrence to the registrar to ascertain what amount is due to said James Wilton Harvey in respect of his one fourth share of the gross profits of said business as mentioned in the order of 4th August 1887.

The registar appointed Mr. Alfred Smither to take the accounts and all motion to confirm Mr. Smither's report to the registrar The Honorable Mr. Justice Crease ordered that the sum of $5.842.24 be paid to said James Wilton Harvey whereas the said James Wilton Harvey is largely indebted to the said estate.

This application is for leave to appeal against the said orders and that the same and all proceedings thereunder may be set aside.

This is the last Will and Testament of me, James Ellard, of New Westminster, British Columbia, Dominion of Canada, Trader. I hereby revoke all former and other Wills, and declare this to be my last Will and Testament, I give devise and bequeath unto Henry Elliott and Walter Blackie, both of New Westminster, their heirs Executors and administrators, all my real and personal property whatsoever and whosoever situate upon trust in the first place to sell all my personal and convert the same into money and to stand possessed of the moneys to arise from such sale and conversion and if any ready money of which I may die possessed, upon trust to pay all my just debts, funeral and Testamentary expenses, and subject thereto to invest the said moneys upon Government or real securities in the province of British Columbia, or elsewhere, or in the purchase of the stock or fully paid up shares of any chartered or incorporated Company paying a dividend with power to my said trustees, or the survivor of them to alter, vary or transpose the same funds or securities, for other funds or securities, of the same or a like nature, and I declare it to be my Will, that my said Trustee or Trustees shall out of the income to arise from the said Trust funds, pay to my wife Emma, so long as she shall remain unmarried the sum of two hundred and forty dollars a year and in case the income to arise from my said personal estate shall be insufficient for that purpose, then I direct that the deficiency shall be made up out of the income of my real estate, and upon further trust to pay and apply the remainder of the income of my said real and personal estate unto my children, living at the time of my decease or born in due time afterwards share and share alike, and after the death or second marriage of my said wife to pay the principal of the trust monies to my children in like shares, as, and when they shall severally attain the age of twenty-one years, or marry whichever shall first happen, and I direct my Trustees or Trustee after the death or second marriage of my said wife or during her life after providing for the due and punctual payment of the hereinbefore mentioned sum of two hundred and forty dollars in their discretion to pay any part of the principal or income of the share of any of my said children in or toward the maintenance and educating of such child until he or she attain the age of twenty-one years or marry, whichever shall happen, and as to my real estate subject as aforesaid I direct that the same shall be divided between all my children in such proportion as will give to each child, share of equal value and I direct that the shares so given shall be conveyed to them on their severally attaining the age of twenty-one years. I further direct that my said Trustees or Trustee during the minority of my children respectively shall defray all taxes and charges which may be imposed on the said

real estate by law out of any monies in their hands as it is my wish that the said real estate shall come to my children free and unincumbered. I further empower my said Trustees or Trustee during the minority of my children to lease all or any part of my said real estate for any term of years, not exceeding five years, in possession on such terms and conditions as to my Trustees or Trustee shall in their discretion think advisable, and I declare that the said Trustees or Trustee hereinbefore named or either of them, or any trustee or trustees to be appoined as hereinafter is mentioned shall die or be absent from this Province for more than twelve calendar months at one time or be desirous of being discharged from, or becoming incapable to act in the trusts of this my Will, then it shall be lawful for the surviving or contiluing trustee for the time (and for this purpose any retiring trustee shall be considered a continuing trustee) or for the Executors or administrators the last surviving or continuing trustee shall appoint any other person or persons to be trustee or trustees in the place of the trustee or trustees so dying or being absent from the Colony, or desiring to be discharged or becoming incapable to act as aforesaid, and upon every such appointment the said trust premises shall be conveyed so that the same may become vested in the new trustees jointly with the surviving or continuing trustee or solely as the case may be.

And I declare that the trustees or trustee of this, my Will, shall be chargeable only with such monies as they shall respectively actually receive and shall not be answerable, the one for the other of them, or for any banker, broker or other person in whose hands any of the trusts monies shall be placed, nor for the unsufficiency of any stocks funds or securities nor for the involuntary losses, and that the said trustees shall reimburse themselves or himself out of any monies which may come to them or his hands under the trust aforesaid all costs, charges and expenses which he or they may incur or be put unto in or about the execution of the aforesaid trusts or any of them, and I appoint Henry Elliott, and Walter Blackie, Executors of this Will and guardians of my children. In witness whereof I have hereunto set my hand at Victoria, British Columbia, this twenty-sixth day of June, A. D., 1873.

Signed by the testator in our presence, who in his presence and in the presence of each other all being present at the same time have hereunto set our hands at witnesses.

"JAMES ELLARD."

"ROBERT JACKSON," Victoria, V. I.

"THOS. H. WILLIAMS," V. I.

"C." This is the paperwriting marked "C," referred to in the affidavit of Alfred Smithers, sworn before me this 24th day of June, A. D. 1889.

W. NORMAN BOLE.

I, James Ellard, hereby revoke the appointment of James Cunningham as one of my Executors, which appointment was made in the Codicil to my last Will, and I hereby appoint Robert Dickinson as one of my Executors in his stead. My Executors being George Turner, of New Westminster, Engineer; and Robert Dickinson, of New Westminster, of Legislative Assembly; and whenever said James Cunningham's name occurs in said Codicil the name Robert Dickinson is to be deemed inserted in his stead, in all other respects I hereby confirm said Codicil.

Signed "James 10th January, 1878, Ellard," as a further Codicil to his Will in the sight and presence of us present at the same time, who in Testator's sight and presence and in the sight and presence of each other hereunto attach our names as witnesses.

"JAMES ELLARD."

"CHARLES T. WOODS."

"W. NORMAN BOLE."

"E."

This is one of the Exhibits referred to in the affidavit of W. Norman Bole, sworn before me this 19th January, A. D. 1878.

"A. ROCKE ROBERTSON."

Filed 28th January, 1878.

"CHARLES G. LEGGATT, A. S. R."

Whereas I, James Ellard, of New Westminster, in the Province of British Columbia, have made and duly executed my last Will and Testament in writing, the date of which I do not recollect, but which is now in the custody of Messrs. Drake & Jackson, Solicitors, Victoria, Vancouver Island; Now, I do hereby declare this present writing to be a Codicil to my said Will, and I direct the same to be annexed thereto and taken as part and explanatory thereof, hereby revoking any clauses or devises in said Will which are contrary or repugnant to this Codicil, and whereas by my said last Will I have appointed Walter Blackie and Henry Elliott Executors thereof, now I hereby revoke said appointment and I appoint James Cunningham, of New Westminster, Member of Parliament, and George Turner, of New Westminster, Civil Engineer, Executors thereof and of this the Codicil thereto.

Whereas I have for sometime past carried on the business of a draper and general dry-goods merchant at my one store sitnate at Columbia Street, New Westminster, and whereas I am desirous that the said business should be carried on after my decease for the benefit of my wife and children, father and mother, in manner hereinafter mentioned. Now, therefore, I do hereby give and bequeath my said business as a draper and general dry-goodt merchant, and all my interest therein, and all stock and effects now or hereafter to be employed therein, and all moneys and debts which shall be due and owing to me at the time of my decease for and on account of the said business or connected with the carrying on of the said business, unto the said James Cunningham and George Turner, their executors or administrators, upon trust. That the said business shall be carried on as heretofore under the title of James Ellard and Company, upon trust, to receive the profits thereof, and in the first place pay thereout to my brother-in-law, James Harvey, in consideration of his managing on said business, and in further consideration of he and his wife minding my children and his wife acting as housekeeper for them as hitherto, in lieu of salary, a sum equal to one-fourth of said profits yearly and every year while he so continue to act as manager of said business, but in case he refuses, neglects or declines so to do, or in case he and his wife do not mind my children, or she neglect to act for them during minority as housekeeper as hitherto. Upon trust to employ some proper and suitable person to manage said business and pay him such salary proportionate to the profits, but in no case exceeding one-sixth as to such trustees shall seem meet, and in case said James Harvey shall at the time of his decease be so acting as the manager of my said business, then upon trust to pay to his wife, my sister, a yearly sum equal to one-fourth of said profits of said business for her sole and separate use and after her death upon trust to divide said interest among her surviving children and in case my said sister shall have no children her surviving, then upon trust to stand possessed of said fourth share of the capital, and profits of said business upon trusts hereinafter set forth with regard to the remaining capital and profits of said business upon trust, to pay out of the proceeds or profits of said business such sum as is now payable for the maintenance of my wife, Emma Ellard, who is now an inmate of a lunatic asylum at Hitchim, Hertfordshire, England, during her natural life and upon trust to pay by way of annuities to my father, Thomas Ellard, Senior, the sum of one hundred dollars yearly, said annuity to be continued to my mother, Mary Ellarad, in case she survives him, always provided the profits from said business are not less than they may be at the time of my decease, when and in such case said annuity shall be

proportionally reduced, and I hereby declare it to be my will that in case said James Harvey shall cease, refuse, neglect, or decline to carry on said business he and those claiming under him shall forfeit all claim or benefit under this Codicil. And I do hereby declare and direct that the said James Cunningham and George Turner, their heirs, executors and administrators shall from and after my decease stand and be possessed of and interested in my said business upon the trusts following, that is to say upon trusts for my six children, Mary Ellard, James Ellard, Ann Maria Ellard, Sidney Ellard, Ada Ellard, Ruben Ellard, in equal shares, the share or respective shares of each of them as shall be under the age of twenty-one years and unmarried at my decease, to be vested in and transferable to him or them as and when he, she or they shall attain that age if sons or marry if daughters which shall first happen if daughters so as such marriage be had with the consent and approbation of said James Cunningham and George Turner, or respective shares of such of them in said business as shall attain the age of twenty-one years if a son or twenty-one years or day of marriage.

Said share shall not be paid till after the expiring of one year from day of marriage, same to be for the sole and separate use of such child, if a daughter free from the debts and control of her then husband, or any future husband and in case of a son, said share not to be paid till after giving twelve months notice of withdrawl to said James Cunningham and George Turner, but always provided such notice cannot be given by any son till he attains the age of twenty-one years. And I desire that in case any one or more of my said children shall die under the age of twenty-one years, if a son or before day of marriage, if a daughter or shall marry without such consent as aforesaid, then as well as the original proportion or portions, provided for each such child so dying as every other portion which he, she or they shall by virtue of this codicil and said Will have taken by way of survivorship or accruer of and in the said business shall from time to time accrue and belong, and be in trust for the others or other of said chiidren in equal shares, and shall become vested in and payable or transferable to my said children as and when their original portion or portions become vested and payable as aforesaid, and with the respect to the profits of the said business subject as aforesaid upon trusts to invest the balance thereof in buildng two good substantial brick houses upon the plot of ground adjoining my new shop, Columbia Street, New Westminster when the profits shall amount to a sufficient sum to build same. And I declare it to be my Will that such of my sons as wish to enter said business shall be taken into same upon attaining the age of sixteen years, and such son so learning the busi-

education of my said children until if sons they shall attain the age of twenty-one years, or if daughters shall attain the age of twenty-one years provided that they have not married without consent of my said Executors, or day of marriage in such marriage take place with the consent of my said Executors as aforesaid, and when and as soon as my said sons shall attain their respective ages of twenty-one years, and my said daughters shall have attained their respective ages of twenty-one years, provided they have not in the meantime married without the consent of my said Executors, or their respective days of marriage when such consent was had and obtained then upon trust to pay each son so attaining the age of twenty-one years or daughter attaining the age of twenty-one years or day of marriage, subject aforesaid his or her equal share of the trust money, stocks, funds and securities in or upon which the same shall be invested into and to the use of such son or daughter for his or her own use and benefit, in case of a daughter same to be for her sole use and benefit free from the debts and control of any husband she may then or thereafter have. Provided always it shall be lawful for my said Executors at any time during the minority of my said sons to dispose of the share or shares, portion or portions of such of my said sons, not exceeding one-third of his other share or shares, in or for the placing of him or them in any professional business or employment or for his or their instruction therein or otherwise for his benefit or advancement in the world, and I declare that the share or shares of such of my children as may die before same becomes payable to him, her or them under the provisions of this Codicil, or may be forfeited as aforesaid, shall be divided share and share alike among my surviving children, and I direct my said Executors, James Cunningham and George Turner, when the youngest of my children shall attain the age of twenty-one years, to stand possessed of the rent of the brick house now built and the two which are to be built upon trust to pay the rents, issue and profits thereof share and share alike to my children as aforesaid, with liberty to them to sell said house to any of my children who may be able to by same.

Next my new shop in Columbia Street, New Westminster, and to apply the monies arising from such sale according to the foregoing trusts of this Codicil, and I hereby revoke the specific disposition of my real property contained in my Will, now in the custody of Drake & Jackson, and I hereby declared that the receipt or receipts of the said James Cunningham or the survivor of them and of the Executors and Administrators of such survivor shall be an effectual discharge for any sum or sums of money that shall become payable to him or them under or by virtue of the trusts aforesaid and the person or persons so

paying such money or moneys shall not be obliged to see to the application thereof or be answerable for any misapplication or non-application thereof or of any part thereof. And I hereby ratify and confirm my said Will save where the same is hereby revoked and altered as aforesaid. In witness whereof I have to this Codicil set my hand and seal this twenty-eighth day of May, 1877.

Signed by the said Testator as a Codicil to his last Will and Testament in the sight and presence of us present at the same time, who in Testator's sight and presence and in the sight and presence of each other have hereunto subscribed our names as witnesses.

"JAMES ELLARD."

[SEAL]

"CHARLES T. WOODS," Archdeacon of Columbia.

"W. NORMAN BOLE," Solicitor.

In the Supreme Court of British Columbia.

In the matter of the trusts of the Will of James Ellard, late of the City of New Westminster, deceased, and in the matter of the Trustee Act of 1850.

Upon hearing Mr. Bole of counsel for George Turner and Robert Dickinson, the executors and trustees under the Will of the late James Ellard, Mr. Eberts of counsel for Mr. A. J. McColl, the Guardian *ad litem* of Mary Ellard, James Ellard, Ann Maria Ellard, Sydney Ellard, Ada Ellard, and Ruben Ellard, the children of the said James Ellard, and Mr. Corbould of counsel for James Wilton Harvey and Esther Harvey his wife, and upon reading the petition of the said George Turner and Robert Dickinson filed the 20th day of November, 1885, and the documents therein referred to, and on reading the affidavit of George Turner sworn the 18th day of November and filed the 20th day of November, 1885, and the exhibits therein referred to, and on reading the affidavit of Robert Dickinson sworn the 18th day of November, 1885, and filed the 20th day of November, 1885.

This Court doth declare that the trusts of the Will and Codicils thereof of the late James Ellard, the testator in the Petition named ought to be performed and carried into execution subject to this decree, and doth order and decree the same accordingly and doth order that the said George Turner and Robert Dickinson be discharged from the duties imposed upon them as executors and trustees under the Will and Codicil thereto of the late James Ellard deceased upon passing and having taken and made the following accounts and enquiries, that is to say:

1. An account of the personal estate not specifically bequeathed of the said James Ellard the testator in the petition named come to the hands of the said George Turner and Robert Dickinson the Executors of his said Will and Codicil or any or either of them or to the hands of any other person or persons by the order or for the use of the said Executors or either of them and especially with regard to the business carried on by them under said Will and Codicil at New Westminster under the name and style of Ellard and Company, and all receipts, disbursements, outlay expenditure, loss and profits, and all profits and losses arising therefrom or connected therewith.

2. An account of the Testator's funeral expenses.

3. An account of the Testator's debts.

4. An account of the legacies and annuities given by the Testator's Will and Codicil.

5. An inquiry what parts if any of the Testator's personal estate are outstanding and undisposed of.

6. An inquiry as to what real estate the Testator was seised of or entitled to at the time of his death,

7. An account of the sales, rents and profits of the Testator's real estate.

And all monies received by the said George Turner and Robert Dickinson or any or either of them, or by any other person or persons or by the order or for the use of them the said Executors or any or either of them in respect thereof. The said accounts and inquiries to be taken before the Deputy Registrar of the Supreme Court at New Westminster copies thereof to be also filed with the Registrar of the Supreme Court at Victoria. Let the said Executors be allowed the sum of $100 each as an honorary recognition of their services in successfully carrying out the Trusts of said Will and Codicils.

And it is hereby declared that Esther Harvey, wife of James Wilton Harvey in the Petition herein named is entitled to the sum of three thousand six hundred dollars in lieu and discharge of her contingent interests under said will and codicils, the same to be paid and payable out of the said business of James Ellard and Company in six equal annual instalments of six hundred dollars each by the receiver hereafter appointed, or by the receiver for the time being. Same to be paid to her on the 20th day of November in each and every year during said term of six years, the first of said instalments to be paid on the 20th day of November, 1886, her receipt to be sufficient discharge to the receiver for payment of the same. Let James Wilton Harvey, the manager named in the said will and codicil be appointed receiver to carry on and manage, under the directions of this Court, the business of James Ellard and Company at New Westminster, to receive the rents and profits of the real and household estates, and to collect and get in the outstanding personal estate of James Ellard, the testator, named with full power and authority to do all matters and things requisite and necessary to the effectual carrying on and managing the said business of James Ellard and Company with power for that purpose, to contract debts, purchase and sell goods, sign, draw, and endorse promissory notes and bills of exchange, as fully and effectually as the said Executors could or might have done under said will and codicil at a salary of two thousand five hundred dollars per annum payable out of the profits of said business; also the free use of while he continues receiver, as a dwelling for himself and family and the children of the said James Ellard of that part of the brick building wherein the business of James Ellard and Company is carried on now used as a dwelling, and let such receiver from time to time pass his accounts at least once a year.

Let the costs of all parties appearing on the petition be taxed and paid out of the estate. Reserve leave to all parties to apply.

[Signed] HENRY P. PELLEW CREASE, *J.*

Dated, Saturday, 20th November, 1885.

In the Supreme Court of British Columbia

In the matter of the trusts of the Will of James Ellard, late of the City of New Westminster, deceased, and in the matter of the Trustee Act of 1850.

And between Robert Dickinson and George Turner, Plaintiffs ;

And Mary Ellard, James Ellard, Annie Ellard, Sidney Ellard, Ada Ellard, Ruben Ellard, James Wilton Harvey and Esther Harvey his wife, Defendants.

By Amendment,

This cause coming on this day to be heard before the full Court by special leave to appeal by Thomas Clive Atkinson and Mary his wife, and James Ellard, Ann Maria Ellard, Sidney Ellard, Ada Ellard, and Reuben Ellard, infants by T. C. Atkinson, their next friend on the 25th day of July 1887, in the presence of Mr. Drake, Q.C. of Counsel for the applicants, Mr. Pooley, Q.C. of Counsel for James Harvey and Esther Harvey, Mr. Bole Q.C. of Counsel for George Turner and Robert Dickinson, and upon opening and debate of the matter, and hearing the order dated the 20th day of November 1885, and what was alleged by Counsel on both sides and upon motion of Mr. Pooley Q.C., that the title be amended by adding to the title the parties to the action and upon reading the Writ of Summons in this action, and the probate copy of the Testator's Will and Codicils, and the affidavits and exhibits filed herein and it being alleged and admitted by the Respondents that the Petition mentioned in the said order now under appeal and all other documents in the case have been lost, and upon reading the Registrar's certificate that such documents have never been filed and it being admitted by all parties that the conduct of the said James Harvey is not impeached, and all parties desiring that he should continue as manager as in the said Will mentioned. This Court doth order that the title of the said order be amended by adding thereto, "and between Robert Dickinson and George Turner, plaintiffs, and Mary Ellard, James Ellard, Annie Ellard, Sidney Ellard, Ada Ellard, Reuben Ellard, and James Wilton Harvey, and Esther Harvey, defendants. This Court doth further order that the order of 30th November 1885, be varied by omitting so much thereof as directs that the sum of $100 00 each be paid to the Executors as an honorary recognition of their services and by omitting the declaration that Esther Harvey is entitled to the sum of $3,600 in lieu and discharge of her contingent interest under the said Will and Codicils, and by omitting the declaration that James Wilton Harvey is entitled to a salary of $2,500 per annum out of the profits of the said business, and to the free use of the Testator's house and dwelling for himself and family. And this Court doth further order that an enquiry

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(STYLE OF CAUSE)

Saturday 18th August 1888.

Upon hearing Mr. Bole Q. C. of Counsel for the plaintiffs, Mr M. W. T. Drake, Q. C. of Counsel for the defendants except James Wilton Harvey and Ester Harvey his wife and upon hearing Mr C. E. Pooley Q. C. and Mr A. J. McColl of Counsel for James Wilton Harvey and upon reading the Report of Alfred Smithers dated the fourteenth day of May 1888 made by him by consent instead of the Registrar of the Supreme Court I do declare that James Wilton Harvey is entitled to receive from the Estate of the late James Ellard for his share of one fourth of gross returns or profits from the death of the said James Ellard up to the thirty first day of December 1887 the sum of $5842.24 and I do order that the said sum of $5842.24 be paid to the said James Wilton Harvey out of the estate of the said James Ellard. 20

Let the costs of all of all parties be taxed and paid out of the Estate.

(Signed) HENRY P. PELLEW CREASE, J.

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It is ordered that Thomas Cunningnam and William Archibald Duncan, be and they are hereby appointed Trustees of the Will of the said James Ellard, deceased, in the place

be had before the Registrar of this honorable court what the profits of the said business of Ellard & Co. have been since the Testator's decease, and showing the outgoing therefrom. And it is further ordered that new trustees appointed of the Testator's Will and thereupon the appointment of the said James Wilton Harvey as receiver shall cease. And it is further ordered that the costs of all parties of and consequent hereon and of the motion for leave to appeal the taxed and paid out of the said estates.

STYLE OF CAUSE.

Thursday, 4th day of August, 1887.

Upon hearing Mr. McColl of counsel for James Harvey and Mr. C. E. Pooley, Q.C., of counsel for Esther Harvey, and Mr. M. W. T. Drake, Q. C., of counsel for Mary Ellard, now Mary Atkinson, and for the other defendants above mentioned other than the said James Wilton Harvey and Esther Harvey, by Thos. C. Atkinson their next friend, and the said Thos. C. Atkinson. And upon reading the draft copy of the order of the full Court made herein on the 25th day of July, 1887, and upon reading the Will of James Ellard deceased, I do order that the said James Wilton Harvey is entitled to draw for his services as manager of the estate of James Ellard deceased, a sum equal to one-fourth part of the gross return or profits of the said business and that the said James Wilton Harvey shall be entitled to pay himself out of the said business a sum equal to one-fourth of the gross returns or profits of the said business from the death of the said James Ellard, that the costs of all parties of and consequent upon this application as been solicitor and client be taxed by the proper office and paid out of the Estate.

[Signed] HENRY P. PELLEW CREASE, J.

STYLE OF CAUSE.

(BEFORE THE HONORABLE MR. JUSTICE CREASE,)

Wednesday the 8th day of February, A. D., 1888.

Upon reading the Petition filed herein on the 13th day of January 1888, and upon reading the Will and codicils of the said James Ellard, and upon reading the order of the 20th day of November 1885, as varied by the order of the Full Court of the 25th day of July 1887, and the order of the 4th day of August 1887, and upon hearing Mr. Drake, Q. C., for the Petitioners, the Cestuis que trust and Mr. Pooley, Q.C., for James Wilton Harvey and Esther, his wife.

It is ordered that Thomas Cunningham and William Archibald Duncan, be and they are hereby appointed Trustees of the Will of the said James Ellard, deceased, in the place

of Goorge Turner and Robert Dickinson, who were discharged by the said order of the 20th November 1885.

And it is further ordered that the said James Wilton Harvey, the receiver do pass his accounts before the Registrar of this Court forthwith and thereupon be discharged.

And it is further ordered that it be referred to the Registrar to ascertain what amount is due to the said James Wilton Harvey in respect of his one-fourth share of the gross profits of the said business as mentioned in the said order of the 4th day of August 1887, and that the said Jaues Wilton Harvey, be paid the sum so ascertained to be due to him forthwith out of the personal or real estate of the said testator by the Trustees hereby appointed.

And it appearing that there are liabilities now existing in respect of the said business, it is declared that the Trustees here be appointed may and they are hereby authorised forthwith to raise by way of mortgage of the Testators real estate a sufficient sum to pay the said liabilities including the amount due to the said James Wilton Harvey as aforesaid and to carry on the business of the said Testator.

And it is further ordered that the costs of all parties as between Solicitor and Client be taxed and paid out of the said estate.

"HENRY P. PELLEW CREASE." /.

STYLE OF CAUSE.

Upon the application of Mr. Bodwell of counsel for T. C. Atkinson, next friend of the above named Annie Ellard, Sydney Ellard, Ada Ellard, and Ruben Ellard, infants. And upon reading the petition of the said infants presented by their said next friend whereby it appears that said Annie Ellard, Sidney Ellard, Ada Ellard, and Ruben Ellard are infants and that Alfred Smither of the City of New Westminster, gentlemen, is a proper person to be appointed their guardian and has no interest in this suit adverse to the said infants as by an affidavit of Thos. C. Atkinson made this day appears. And upon reading the said affidavit and the two affidavits of T. C. Atkinson of the 14th instant. This Court doth order that the said Alfred Smither be assigned the guardian of the said infants Annie Ellard, Sydney Ellard, Ada Ellard and Ruben Ellard by whom they mny defend this suit and make such applications to or take such proceedings in this Court as they may be advised.

Dated the 17th day of June, A. D. 1889.

MATT. B. BEGBIE, C. J.

STYLE OF CAUSE.

To the Honorable the Judges of the Supreme Court of British Columbia sitting as a Full Court.

The humble petition of Annie Ellard, Sidney Ellard, Ada Ellard, and Ruben Ellard, all of the City of New Westminster, by Alfred Smither, of the same place, their Guardian *ad litem* appointed under an order of Court, dated the 15th day of June, 1889; Sheweth

1: That your petitioners are children of James Ellard, late of New Westminster, B. C., deceased, who died on or about the 10th day of January, 1878, and are all infants within the age of twenty-one years.

2. That at the time of the decease of the said James Ellard, he was engaged in business at New Westminster, as a dry-goods merchant, under the firm name of James Ellard & Company. The children of the deceased who survived him are your petitioners, and the defendants Mary and James. The said defendant James Wilton Harvey intermarried before the death of the said James Ellard, with a sister of the said James Ellard.

3. By the terms of the last Will and Testament of said James Ellard, the trustees therein mentioned, the said plaintiffs, Robert Dickinson and George Turner were directed to carry on the business of James Ellard and Company upon trust to receive the profits thereof and in the first place to pay thereout to the said James Wilton Harvey, in lieu of salary, and in consideration of his managing said business and of his wife and himself assuming the care and nurture of the remaining children of the said testator during their minority, a sum equal to one-fourth of said profits yearly and every year while he so continues to act as manager of said business. Your petitioners for greater certainty crave leave to refer to the said Will.

4. That on the 4th of August, 1887, an order was made in this cause by the Honorable Mr. Justice Crease, directing that James Wilton Harvey, one of the defendants, be entitled to draw for his services as manager of the estate of James Ellard, a sum equal to one-fourth part of the gross returns or profits of the said business from the death of the said James Ellard, and that the costs of all parties of and consequent upon said application as between solicitor and client be taxed by the proper officer and paid out of the estate.

5 By another order of the Honorable Mr. Justice Crease dated the 8th February, 1888, it was directed that an account should be taken of what was due said James Wilton Harvey in respect of his one-fourth share of the gross profits of the said business as mentioned in the said order of the 4th day of August 1887.

6 By a further order made by the Honorable Mr. Justice Crease, dated August 18th 1888, it was declared that the said James Wilton Harvey was entitled to receive from the estate of the said James Ellard for his share of one-fourth of gross returns or profits from the death of the said James Ellard, up to the 31st December 1887, the sum of $5,842.24, and it was further ordered that the said sum of $8,842.24 be paid to the said James Wilton Harvey out of the estate of the said James Ellard, and that the costs of all parties be taxed and paid out of the estate.

7 That the said last mentioned order besides proceeding upon an erroneous principle was based upon an error in calculation, such error being the placing of a sum of $10,770.48 on the wrong side of the account.

8 You Petitioners were not represented upon the applications upon which the said orders or either of them were made.

9 Your Petitioners further say that under color of the said orders large sums have been retained out of the estate of the said James Ellard by the said James Wilton Harvey the retention of which moneys is not authorised or provided for by the last Will and Testament of the said James Ellard deceased. Your Petitioners humbly submit that the said orders are erroneous and prejudicial to your Petitions.

Your Petitioners humbly pray for leave to appeal against the said orde[illegible] same and all proceedings taken thereunder may be discharged and set asid[illegible] said James Wilton Harvey may be ordered to account for all moneys received or retained by him out of the estate of the Testator beyond the moneys authorised to be paid to or retained by him under the Tastator's will. And your Petitioners will ever pray, etc,

"THEODORE DAVIE,"

Counsel of Petitioners.

To the said Robert Dickinson and George Turner. To James Wilton Harvey and Esther Harvey, and to T. C. Atkinson and Mary his wife, and to James Ellard.

In the Supreme Court of British Columbia.

ELLARD

v.

ELLARD.

Saturday, 18th August, 1888.

I have considered the arguments of counsel, and the report of Alfred Smithers, the Accountant, (of the 14th May, 1888) who was appointed to ascertain what sum one-fourth of the gross returns or profits of James Ellard and Company, between the date of James Wilton Harvey's appointment as Manager, and the 31st December, 1887 would amount to, to enable the order of the Court of the 4th August, 1887 to be carried out in favor of James W. Harvey the Manager.

Mr. Smithers seems not to have clearly apprehended the extent of the duty he was by the consent of both parties, called on to discharge, and to have experienced a difficulty in determining the meaning of the words "gross profits" and from this cause gave himself a quantity of very unnecessary trouble.

Had the order of Court of the fourth August, 1887 been shewn to him, he would there have read the words "Gross returns or profits" made since the death of the said testator adding "and of the amount received by the said J. W. Harvey and Esther Harvey."

The meaning of the phrase "gross returns or profits," so common in legal documents dealing with partnership or firm accounts is clearly laid down in "Lindley on partnership," 5th Ed. Vol. 1., p p. 8 and 9 who says:

"The actual or gross returns obtained by advances obviously include profits, if profits have been made. But those returns do not include losses, if losses are incurred; for losses are excess of advances over the returns and come out of the advances, not out of the returns. Hence persons who share gross returns necessarily share profits, but they do not, by sharing the returns, share losses; for these fall entirely on those making the advances."

Moreover although a division of gross returns is a division of profits, if there are any, it is so only incidentally and because such profits are included in what is divided. It is not a division of profits as such; and under an agreement for a division of gross returns whatever is returned must be divided whether there be profit or not.

Of Mr Smithes skill and rectitude as an Accountant, both sides spoke favorably; so the mistakes he made in attaining the desired end may be attributed to something erroneous in the instructions he received: although I do find mistakes of his own in his analysis of the accounts, which were unnecessarily elaborate such as the $320.00 damages paid by an insurance Company for non-delivery of certain goods in transit the chargefor Insurance Dress-making and the like which belong to the expenses of the business, with which the gross returns or profits have nothing to do.

I have thought it right to consult with more than one accountant in this matter; and have been struck by the decided proclivity of each of these gentleman to work out the account of the gross profits as if it were one of net profits. This tendency crops out on all occasions and necessarily affects the accuracy of their conclusions.

By the assistance however, derived from the various sources before me, I have at length at a result, which fairly carries out Lord Justice Lindley's definition in ascertaining the gross returns required in this case.

To effect this we have first to ascertain the gross proceeds of sales from the testator James Ellard, to the 31st December 1887. Next, in order to ascertain the cost of the goods sold in that time, we have to find the value of the goods which Harvey took over as Manager; and to those add the cost of goods since purchased by him; less any balance unpaid thereon.

From the sum thus arrived at, we have still to deduct the cost of any goods remaining still on hand on the 31st December 1887.

Then by deducting the result thus obtained from the gross proceeds of sale first stated, we shall get a sum which constitutes the gross returns or profits up to 31st December 1887. And when from this we have deducted any sum unaccounted for in Mr. Harvey's accounts, we shall have the balance of "gross returns or profits" up to the end of 1887, of which one fourth is to be credited to Mr Harvey; and this is what the Accountant was employed to get, but failed to ascertain.

Stated in figures the account would stand thus:

Proceeds of sales during the prescribed interval		$260,800.58
The cost of goods taken over by Harvey when he became manager	$19,882.31	
The cost of goods subsequently purchased by him $194,305.27 less $10,770.48 unpaid thereon	183,534.79	
	$203,417.10	
Deducting the cost of goods on hand	26,615.18	
		176,801.92
Leaves		$83,998.66
Deduct unaccounted for		1,058.60
		$82,940.06

Of which

The

Received
Amount

The su
up to t
Ellard

Of which Harvey's one quarter share.....$20,735.01

The sums admitted by him are as follows:

Received on account to end of year 1887	$14,292.77	
Amount paid Mrs. Harvey.....	600.00	
		$14,892.77
		$5,842.24

The sum claimed by Mr. Harvey as balance and which I now order to be credited to him up to the 31st December 1887 in account with the estate and under the Will of James Ellard deceased.

(Signed) HENRY P. PELLOW CREASE, J.